

Mikhailioug v. Ashcroft, Nos. 03-70751, 03-70753

**OCT 13 2004**

Judge CALLAHAN, dissenting:

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

I agree with the majority that the question presented by this case is whether petitioners' mistreatment constituted persecution on account of one of the five statutory grounds set forth in 8 U.S.C. § 1101(a)(42)(A). The statute defines a refugee as a person who is unwilling to return to his or her homeland because of persecution or well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." The majority does not really indicate the statutory ground on which petitioners qualify for relief. Instead, relief is granted on the ambiguous basis of being persecuted "because of political opinion based on their status as new entrepreneurs in post-communist Russia." I cannot agree with my colleagues because the record clearly shows that petitioners denied stating, or being asked, their political opinions and because the record belies the existence of a cognizable social group consisting of "new entrepreneurs."

Furthermore, even assuming that petitioners demonstrated past persecution on account of one of the statutory grounds, the proper disposition is to remand these cases to the Board of Immigration Appeals. The very authority cited by the majority for not remanding the cases, *Baballah v. Aschroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004), states "[n]onetheless, because the ultimate decision to grant

asylum is discretionary, we remand so that the Attorney General may determine whether to grant relief.”